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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 350

PASQUALE PALERMO,

Petitioner,

—against—

LUCKENBACH STEAMSHIP COMPANY, INC.,

Respondent.

PETITIONER'S BRIEF IN OPPOSITION TO MOTION TO RECALL AND AMEND THE JUDGMENT

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charge (Request No. 12) that petitioner could not recover if the jury found that respondent had furnished a known, safe and convenient route and petitioner voluntarily chose to use an unsafe route which he knew to be unsafe. The Court of Appeals reversed and remanded for a new trial, 246 F. 2d 557, holding that if the jury found the facts to be as indicated in Request No. 12, petitioner's injury did not result from any breach of duty by respondent, and the jury should be permitted to decide those facts under an appropriate charge. This Court granted certiorari and simultaneously reversed and remanded, without briefs or argument on the merits, although respondent's brief opposing certiorari dealt only with reasons why it should not be granted.

Grounds for Rehearing

I. Misapprehension of the Facts.

This Court held that "The petitioner's alleged choice of a *more* dangerous route did not, under the proofs, operate to bar recovery as a matter of law" (emphasis added). Use of the comparative indicates the Court's belief that both routes were dangerous. That is not true. The evidence showed that the starboard passage was safe and Request No. 12 told the jury the law only if they so found. The Court's misapprehension no doubt resulted from its acceptance of erroneous statements in the petition and reply brief that the starboard side was inaccessible and that the vessel was "admittedly unseaworthy". Respondent prays for a hearing and decision based on the facts shown in the record, rather than on partisan assertions by petitioner.

II. Misapprehension of the Law.

The minority summarily reversed on authority of *Rogers v. Missouri Pacific*, 352 U. S. 500. The majority

relied upon *Rogers* to summarily reverse the companion case, *Gibson* v. *Thompson*, No. 142. There are vital distinctions between *Rogers* and this case.

In *Rogers*, the lower court entered judgment for defendant notwithstanding the verdict and this Court granted *certiorari* to consider whether the jury's function had been invaded (352 U. S. at 501). Here, the Court of Appeals has simply ordered a new trial so that a properly charged jury can determine the facts. As such, the decision is completely consistent with *Rogers*.

In *Rogers*, an on-duty employee sued his employer under the F. E. L. A. and this Court, impelled by the provisions of the statute, held that the employer was liable if employer negligence played any part, "even the slightest" (352 U. S. at 506). This suit is by an off-duty non-employee who has no right to the benefits of the statute, and there are compelling reasons of first impression why the extreme *Rogers* rule should not be here applied, at least not without the same full measure of review and mature consideration normally accorded after certiorari has been granted (cf. *Rogers*, 352 U. S. at 509; *Ferguson* v. *Moore-McCormack*, 352 U. S. 521, 527).

Petitioner relied on Judge Clark's dissent, to the effect that the jury must have found the port side unsafe, and claimed that this amounted to unseaworthiness regardless of the safe condition of the starboard side. But reasonable fitness, not "even the slightest" defect, has always been the test of seaworthiness. *Boudoin* v. *Lykes Bros. S. S. Co.*, 348 U. S. 336, and cases cited at p. 339.

Moreover, proximate causation, not whether the condition played "even the slightest" part (*Rogers*, 352 U. S. at 506), has always been the measure of liability. In *The Osceola*, 189 U. S. 158, this Court held that, to result in shipowners' liability, injuries must be "in consequence of" unseaworthiness (p. 175). In *Carlisle Packing Co.* v.

Sandanger, 259 U. S. 255, this Court held that injuries must be "the direct result" of unseaworthiness before the seaman is entitled to recover (p. 259). In *Mahnich* v. *Southern S. S. Co.*, 321 U. S. 96, recovery was allowed because the seaman's injury was "the proximate and immediate consequence of the unseaworthiness" (p. 103).

The majority's opinion and reference to pages 408-9 of *Pope & Talbot* v. *Hawn*, 346 U. S. 406, indicate that petitioner induced a belief that the issue is whether petitioner's negligence should mitigate or bar recovery. That is not and never has been an issue. The question is whether the jury should be permitted to find, if the facts warrant, that petitioner's injury did not result from any breach of duty by respondent.

III. Other Grounds.

Assuming, as petitioner does, that the doctrine of assumption of risk is involved (although the Court of Appeals emphasized that it was not invoking the doctrine, 246 F. 2d at 559), this case raises the very question reserved for later determination in *Socony-Vacuum* v. *Smith*, 305 U. S. 424. *Socony* held that assumption of risk was not a complete defense to a Jones Act claim by a seaman injured while on duty at sea. However, the Court decided to:

> "• • • leave to future cases as they may arise the determination of what rule is to apply in cases where the seaman's election • • • is • • • made while not on duty." (305 U. S. at 433)

Since the reasons *Socony* gave for holding that the doctrine did not bar the Jones Act claim of an on duty seaman injured at sea (305 U. S. at 430-1) are patently inapplicable to a non-Jones Act claim against a third party by an off-duty longshoreman injured in port, we earnestly submit that the *Socony* result should not be summarily applied to a situation expressly left undecided by *Socony*.

Because of conditions long since remedied, seamen who go to sea in ships have been given unique rights against their employers. There is no basis in past or present conditions for summarily bestowing upon an off-duty longshoreman in port greater rights against a shipowner than have ever been granted to an on-duty seaman at sea, or for summarily, and without Congressional legislation after hearings, applying against a shipowner the insurer principles of the Longshoremen's and Harbor Workers' Compensation Act, but without the schedule of awards which imposes limits upon the liability of the longshoremen's own employer.

CONCLUSION

For the foregoing reasons we respectfully urge that this petition for rehearing be granted, that the case be set down for briefs and argument in the regular way and that, upon further consideration, the judgment of the court below be affirmed.

Dated: New York, New York,
November 7, 1957.

EUGENE UNDERWOOD,
Counsel for Petitioner.

WILLIAM M. KIMBALL,
of Counsel.

Certificate of Counsel

I, EUGENE UNDERWOOD, counsel for the above named petitioner do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

EUGENE UNDERWOOD,
Counsel for Petitioner.

Brief in Opposition to Petition for a Writ of Certiorari

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Petitioner,

v.

LUCKENBACH STEAMSHIP COMPANY, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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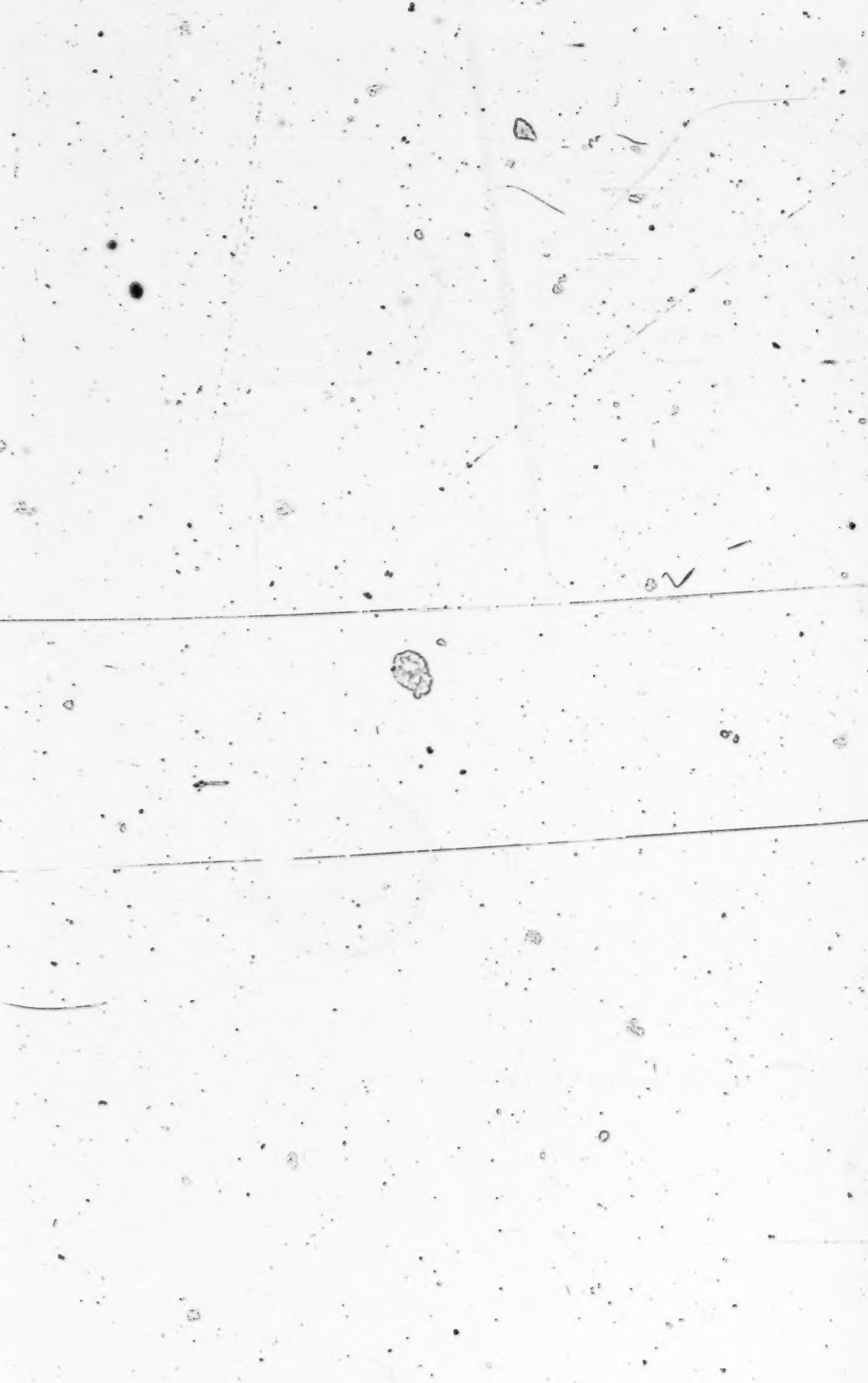

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Opinions Below

The opinion of the Court of Appeals is not yet reported. It is printed in the appendix to the petition at pp. 19 et seq. The charge to the jury is found at pp. 3-9 of appellant's appendix below, and the opinion of the District Court denying respondent's motions after trial, not reported, is found at pp. 11-12 of the same.

Questions Presented

Can a longshoreman recover damages from a shipowner, on grounds of negligence or unseaworthiness, where a safe route to his place of work has been provided, but the longshoreman, although knowing the safe route, elects to take a route known to him to be unsafe and sustains injuries thereon?

On a motion for a new trial for excessiveness of verdict, is the Trial Court powerless to grant the motion unless it can be demonstrated that there was no substantial evidence to support the verdict?

On a motion for a new trial for excessiveness, is a Trial Court powerless to consider whether the jury has made adequate allowance for contributory negligence?

Statement of the Case

As the Court of Appeals found (Appendix to Petition, pp. 20-22) the facts are these:

Petitioner was hatch boss of a gang discharging No. 2 hatch of respondent's steamship MARINE SNAPPER which lay starboard side to the pier. At 6:00 p. m. the longshoremen went ashore for "lunch". At 7:00 p. m. they returned, petitioner a minute or two behind the others. The ship had a raised fore deck on which the bridge house and Nos. 1 and 2 hatches were located. After boarding the ship on the starboard side aft petitioner crossed to the port side, proceeded forward and, at the after end of the fore deck climbed the ladder to that deck. He then walked forward along the port passage between the house and the port rail. Near the forward end he fell, sustaining injury.

There was evidence from which the jury could find (although there was evidence to the contrary) that the port passage was spotted with grease and in darkness. Petitioner testified that he knew of the grease and the darkness but that he "just didn't think" (Appendix, *infra*, pp. i-ii).

There was evidence from which the jury could find that petitioner, after mounting to the fore deck, could have crossed to the starboard side by a thwartships passage directly abaft the bridge house, then forward to his work place along the starboard passage, which was sufficiently

lighted and otherwise safe. Since petitioner's gang was working on the starboard side, that route would have been equally convenient.

Respondent requested charges that petitioner had a duty to use his special knowledge as a longshoreman to avoid injuring himself and was not entitled to recover if he knowingly chose an unsafe route if there was a safe route on the starboard side of which he knew (Appellant's appendix below, p. 10). These were denied and the Court charged that if petitioner, knowing the condition of the port passage, should have been more careful than he was, his recovery need only be diminished *pro tanto* (*id.*, p. 7).

The jury brought in a general verdict for $65,000. Respondent moved to set aside, and for judgment N.O.V., or for a new trial, on the ground that the verdict was contrary to law in that the injuries did not result from any breach of duty by respondent because respondent had provided a safe route which was known to petitioner, and on the ground that the verdict was excessive, particularly in the light of petitioner's flagrant negligence.

The Court denied the motion to set aside and for judgment N.O.V. Dealing with the motion to set aside for excessiveness, the Court felt that "the jury may have been over generous" and admitted that the amount of the verdict "gave me some concern" but concluded that it was powerless to set the verdict aside for excessiveness "unless it can be demonstrated that there was no substantial evidence to support the verdict" (id. pp. 11-12). Respondent urged that the Court must consider whether the jury made any, or adequate, reduction for petitioner's obvious negligence but the Court felt that it was powerless to consider this aspect saying:

> "Nor since the verdict was a general verdict can one speculate as to what part if any the defense of contributory negligence played in the determination of the jury" (id. p. 12).

The Court of Appeals held only that the injuries did not result from any breach of duty by respondent if there was a known, safe route to petitioner's work place and he chose to use one he knew was dangerous. The Court therefore remanded so that the jury, under proper instructions, may pass upon the safety of the starboard passage which the Trial Court refused to permit.

The Court of Appeals did not pass upon either of the other questions, each of which would have required a remand if the Court accepted respondent's position.

Argument

No new law was made or attempted below. This case involves only the application of established principles to its own facts. When petitioner reached the foredeck he had two ways to go around the deck house, *i. e.*, straight ahead on the port passage and to starboard when he reached the forward end of the house, or straight across to the starboard side aft of the house and then forward along the starboard passage. The 'thwartship passage abaft the house was 3' wide and there was no proof that it was either restricted or dangerous—contemporaneous records showed that No. 3 hatch was not then working; hence no operations there could have interfered.

Although petitioner was a longshoreman, and in that sense a seaman and a beneficiary of a warranty of seaworthiness, only the ordinary principles of negligence apply to him. The Jones Act—F.E.L.A. "even the slightest" rule does not apply because he does not meet the statutory condition that he be an employee* of respondent. As to both seaworthiness and negligence the decision below holds

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* This is no technicality. Without the employer-employee relationship respondent had no power to control petitioner's movements and methods.

only that respondent fulfilled its duty when it supplied a known, safe way to the work place and that the proximate cause of petitioner's injury was his own negligence in pursuing a route which he knew to be unlighted and grease-covered although the equally convenient, safe route was known to him.

1. Warranty of Seaworthiness

The decision below in no way lessens a shipowner's duty to provide a seaworthy ship and there is no conflict with *Sieracki, Hawn or Mahnich* *. The Court below held only that the jury should have been instructed that they must find for the defendant if they found that there was a known, safe and convenient route to petitioner's work place, even if they should also find that there was an unsafe route, known to be unsafe. There is ample precedent for holding that a vessel is not unseaworthy merely because one way is unsafe where the danger is, as here, known and obvious and there is an equally convenient, known and safe counterpart **.

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* *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85; *Pope & Talbot* v. *Hawn*, 346 U. S. 406; *Mahnich* v. *Southern S. S. Co.*, 321 U. S. 96.

** *Hardie* v. *New York Harbor Drydock Corp.*, 9 F. 2nd 545 (1925; 2 Cir.); *Long* v. *Silver Line, Ltd.*, 48 F. 2nd 15 (1931; 2 Cir.); *Holm* v. *Cities Service Transport Co.*, 60 F. 2nd 721 (1932; 2 Cir.); *Johnson* v. *United States*, 74 F. 2nd 703 (1935; 2 Cir.); *Bohannon* v. *United States*, 185 F. 2nd 678, 1951; 2 Cir. Affirming 92 F. Supp. 700 (1950 S. D. N. Y.); *Wong Bar* v. *Suburban Petroleum Transport, Inc.*, 119 F. 2nd 745 (1941; 2 Cir.); *Tampa Interocean S. S. Co.* v. *Jorgensen*, 93 F. 2nd 927 (1938; 5th Cir.), certiorari denied 304 U. S. 566; *Vielski* v. *Pacific-Atlantic S. S. Co.*, 163 F. 2nd 553 (1947; 9th Cir.); *Manera* v. *United States*, 124 F. Supp. 226 (1954; E. D. N. Y.); *Grenawalt* v. *South African Marine Corp.*, 130 F. Supp. 432 (1955; S. D. N. Y.).

The decision below is merely an application of the rule that seaworthiness is not perfection but reasonable fitness *. The decision is consistent even with F. E. L. A. cases which hold no liability where the proximate cause is plaintiff's own disregard of his own safety in electing to pursue a known dangerous way when he knew of an equally convenient, safe one. *Carter* v. *Atlanta & St. A. B. R. Co.*, 338 U. S. 430, 434-5. *Jackson* v. *Illinois Northern Railway*, 224 F. 2d 76 (7 Cir. 1955); *Wolfe* v. *Henwood*, 162 F. 2d 998 (8 Cir. 1947), *certiorari* denied 332 U. S. 773; *Willis* v. *Pennsylvania R. Co.*, 122 F. 2d 248 (2 Cir. 1941), *certiorari* denied 314 U. S. 684.

2. Assumption of Risk

Assumption of risk was not the defense and the Court "emphasize(d) that in deciding this case we are *not* invoking assumption of risk principles" (Petitioner's Appendix, p. 24). The sole basis for the decision was that respondent had fulfilled its duty of due care and seaworthiness by providing a known, safe and convenient route. Without some breach of duty there can be no assumption of risk doctrine. The two are mutually exclusive. *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54; *Owens* v. *Union Pacific R. Co.*, 319 U. S. 715. *Socony-Vacuum Co.* v. *Smith*, 305 U. S. 424, was a Jones Act case from which petitioner takes no help because of the fundamental distinctions, which this Court pointed out at pages 430-1, between sea and shore employment, and because petitioner, not respondent's employee, does not come under the Jones Act or F. E. L. A.

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* *Boudoin* v. *Lykes Bros. S. S. Co.*, 348 U. S. 336, 339; *Mahnich* v. *Southern S. S. Co.*, 321 U. S. 96, 103; *Poignant* v. *United States*, 225 F. 2d 595 (2 Cir.); *Lester* v. *United States*, 234 F. 2d 625, 628-9 (2 Cir.); *Doucette* v. *Vincent*, 194 F. 2d 834 (1 Cir.); *Nunes* v. *Farrell Lines*, 227 F. 2d 619 (1 Cir.); *Reynolds* v. *Royal Mail Lines, Ltd.*, 147 F. Supp. 223, 227 (D. C. Cal.).

3. Alleged Conflicts

There is no conflict with the Ninth or Sixth Circuit decisions petitioner cites. In *Pacific Far East Lines* v. *Williams*, 234 F. 2d 378 (9 Cir. 1956) and *Imperial Oil Limited* v. *Drlik*, 234 F. 2d 4 (6 Cir. 1956) the sole issue was whether the one available way was safe. The issue here was not present, *viz.*, whether the shipowner fulfills his duty by providing one known, safe route where plaintiff is injured while following a route known to him to be unsafe.

There is no conflict with *Neese* v. *Southern Railway Co.*, 350 U. S. 77. There the District Court imposed a remittitur which plaintiff accepted, but the Court of Appeals reversed and remanded, holding that the Court should have set the verdict wholly aside because without support as to damages. This Court held only that the Court of Appeals erred in regarding the action of the District Court as an abuse of discretion, and hence erred in reversing. The contrast with this case is sharp and highlights an additional reason for denying the writ. There can be no question of the power and duty of the District Court, in a proper case, to impose a remittitur; yet, although respondent so urged, the Court considered itself powerless to act "unless it can be demonstrated that there was no substantial evidence to support the verdict" (Appellant's appendix below, pp. 11-12). Plainly, therefore, the Court erred in refusing to consider on its merits the motion to set aside for excessiveness. *Comiskey* v. *Pennsylvania R. Co.*, 228 F. 2d 687 (2 Cir. 1956). This error was the greater because the Court also concluded it was powerless to consider whether the jury had made any, or proper, allowance for petitioner's negligence (id. p. 12). Plainly petitioner was negligent in entering a passage he knew to be unlighted and greasy. *Stoffel* v. *New York, N. H. & H. Ry Co.*, 205 F. 2d 411 (2 Cir. 1953); *Bohannon* v. *United States*, 92 F. Supp. 700 (S. D. N. Y. 1950); *McLean* v. *Studebaker*

Brothers Co., 221 N. Y. 475 (1917); *Cosby* v. *City of Rochester*, 1 N. Y. 2d 396 (1956); *Fox* v. *Mission of the Immaculate Virgin*, 309 N. Y. 812 (1955). The Court had the power and duty to exercise supervision over the jury's deduction for petitioner's negligence; otherwise juries, after listening to the best of instructions as to reducing for contributory negligence, could give away defendants' money without limit. *Socony-Vacuum Company* v. *Smith*, *supra*, 305 U. S. 424 at 432-3; *Union Pac. R. Co.* v. *Hadley*, 246 U. S. 330; *Pennsylvania R. Co.* v. *Sheeley*, 221 Fed. 901 (6 Cir. 1915); *Herring* v. *Luckenbach S. S. Co.*, 137 F. 2d 598 (2 Cir. 1943). Because of these errors, upon which the Court of Appeals did not pass, this case must in any event be remanded to the District Court; hence this petition is premature.

4. Interference with the Jury's Function

It seems incredible that petitioner complains that the Court of Appeals has thwarted the jury's function. The shoe is on the other foot. By the instructions requested but refused respondent sought to have the jury pass upon the existence of a safe and convenient passage on the starboard side. The only interference with the jury's function was the District Court's refusal to let the jury consider that issue. All the Court of Appeals has done is to remand so that the jury may decide.

For the foregoing reasons the petition should be denied.

Respectfully submitted,

EUGENE UNDERWOOD,
WILLIAM M. KIMBALL,
Counsel for Respondent.

New York, N. Y.,
August 30, 1957.

Appendix

Extracts from petitioner's testimony (references are to the record certified by the District Court to the Court of Appeals).

As to Grease.

Direct examination.

"Q. Now, during this day and the day before when you were on the ship, did you walk in that passageway on the port side where you had your accident? A. Yes, sir.

Q. I am talking about the daylight hours. A. Yes, sir.

Q. Will you tell the Court and jury what you observed about the deck in the area of that winch and the passageway when you walked just before you fell? A. Well, it was all spotted and greasy—

Q. You knew it was there? A. Yes, sir" (R. 99).

Cross examination.

"Q. You had worked on the ship the previous day? A. Yes.

Q. You had worked on the ship that day, too? A. Yes, sir.

Q. And you had worked all that day? A. Yes, sir.

Q. How many times did you say you had gone back and forth over that same area? A. About a dozen times.

Q. Was there always grease there? A. Yes.

Q. Always, every time? A. All the time" (R. 143).

* * *

"Q. These grease patches were all over the deck in the area of the winch drums; is that what you say? A. Yes, that particular spot, yes.

Q. You knew they were there? A. Yes.

Q. They had been there all that day and all the previous day? A. Yes, sir" (R. 146).

Appendix—Extracts from Petitioner's Testimony

As to Darkness.

Cross examination.

"Q. Now, when you went off for your lunch at six o'clock was it dark yet; do you remember? A. Yes.

Q. Did you go back by the port side? A. Yes, sir.

Q. In the same passageway that you fell? A. Yes, sir.

Q. And what was the situation as to light at that time? A. It was completely dark.

Q. Just completely dark? A. Yes" (R. 147-8).

* * *

"Q. Had you noticed at any time before that those lights were out? A. Yes, sir.

Q. When? A. It was about before I went, six o'clock.

Q. When you went out to lunch at six o'clock you noticed then that both of those lights were not burning? A. That is right, and I told the mate about it.

Q. Whom did you tell about it? A. One of them mates that was on deck" (R. 150).

Petitioner "Just Didn't Think".

Cross examination.

"Q. So that when you came back after your lunch, you knew that this passageway had grease on it? A. Yes.

Q. And you knew that the lights were out? A. Yes.

Q. And nevertheless you walked along there; is that right? A. Yes, I pass by and I never think for the minute that grease on the floor because your mind on the job.

Q. Did you think and decide to take a chance or— A. No.

Q. You just didn't think? A. Yes, I not think at all" (R. 152).